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No. 80-2034

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ECKERD DRUGS OF GEORGIA, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

J. DAVID RICHESON
RICHESON & BROWN
Post Office Box 14577
North Palm Beach, Florida 33408
(305) 842-4220

Counsel of Record for Petitioner

JAMES G. BROWN
RICHESON & BROWN
Post Office Box 14577
North Palm Beach, Florida 33408

Counsel for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED FOR REVIEW

Can a reviewing court summarily affirm an agency order when the order results from a misapplication by the agency of its existing precedent and standards in abuse of its discretion.

LIST OF ALL PARTIES AND RELATED COMPANIES

The parties involved are those named in the caption: Eckerd Drugs of Georgia, Inc., Petitioner and National Labor Relations Board, Respondent.

Petitioner is a corporation. The following is a list of parent companies, subsidiaries and affiliates:

Petitioner, Eckerd Drugs of Georgia, Inc., is a wholly owned subsidiary of Eckerd Drug Company which is a wholly owned subsidiary of Jack Eckerd Corporation. Jack Eckerd Corporation and Eckerd Drug Company have other wholly owned subsidiaries including Bancroft Realty Co., Clorwood Distributors, Inc., Rac-Rite Service Merchandisers of Texas, Inc., J. Byrons Enterprises, Inc., j. b. Advertising, Inc., Mading Longpoint, Inc., EDC Drugs, Inc., and New American Home Video, Inc. The subsidiaries operate Eckerd Drug Stores, Eckerd Optical Centers, Eckerd Photolabs, apparel shops and distribution centers in several states and J. Byron Department Stores in Florida.

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OCTOBER TERM, 1980

No. _____

ECKERD DRUGS OF GEORGIA, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Eckerd Drugs of Georgia, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Apppeals for the Fifth Circuit entered in this proceeding on April 13, 1981.

OPINIONS BELOW

The Decision of the Court of Appeals is unpublished, but is contained in the Appendix, hereto.

The Decision and Order of the National Labor Relations Board rendered March 5, 1980, is reported at 248 NLRB No. 4 and is contained in the Appendix, hereto.

The Decision and Direction of Election of the National Labor Relations Board, rendered July 13, 1979, is not reported, but is contained in the Appendix, hereto.

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 13, 1981. No petition for rehearing was filed and this petition for certiorari was filed within ninety (90) days of the date of entry of judgment. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 10(e) of the National Labor Relations Act as amended, 29 U.S.C. 160(e), as set forth in the Appendix, hereto.

STATEMENT OF THE CASE

This case was before the United States Court of Appeals for the Fifth Circuit on the application of the National Labor Relations Board ("Board") pursuant to Section 10(e) of the National Relations Act, as amended (29 U.S.C. Section 160(e)) for enforcement of its order issued on March 5, 1980, against Petitioner. The Board's Decision and Order is reported at 248 NLRB No. 4, and contained in the Appendix, hereto.

On April 13, 1981, after oral argument, the Fifth Circuit Court of Appeals in a unpublished *per curiam* decision enforced the Board's order without an opinion

pursuant to Rule 21, (Affirmance Without Opinion), of the Local Rules of the Fifth Circuit Court of Appeals. The decision is contained in the Appendix, hereto.

A. Course Of Administrative Proceedings Before The National Labor Relations Board.

On June 11, 1979, Truck Drivers and Helpers Local Union No. 728 ("Union") filed a representation petition seeking to represent "over-the-road drivers" employed by Petitioner at its College Park, Georgia distribution center.

After a hearing, the Regional Director for the Board's Tenth Region determined that the following unit was appropriate:

> All over-the-road drivers, employed by the Employer at its College Park, Georgia facility, but excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

On July 23, 1979, Petitioner filed a Request for Review objecting to the unit determination and claiming that a substantial question of law and policy was raised because of departure from Board precedent. The Board denied Petitioner's Request for Review on August 6, 1979. Following a secret ballot election, the Union was certified on August 17, 1979, as the collective bargaining representative of the employees in the bargaining unit.

The Union, on August 30, 1979, requested bargaining with Petitioner. Petitioner refused and contested the appropriateness of the certified bargaining unit. The Union then filed an unfair labor practice charge alleging a refusal to bargain. A complaint was issued on October 15, 1979. Petitioner filed an Answer admitting the

refusal to bargain, but challenging the appropriateness of the certified unit.

On November 23, 1979, the Board entered an Order to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. On December 3, 1979, Petitioner filed it's Response to the Show Cause Order. Petitioner again raised the issue of the inappropriateness of the certified unit and again claimed that the unit determination improperly departed from Board precedent.

On March 5, 1980, the Board issued its Order and granted the General Counsel's Motion for Summary Judgment. The Board reaffirmed the Regional Director's unit determination and found Petitioner had refused to bargain in violation of §8(a)(1) and 8(a)(5) of the Labor Act as amended 29 U.S.C. §158(a)(1) and (5) and ordered Petitioner to bargain with the Union upon request. The Board then made application to the Fifth Circuit for enforcement of its Order. As stated above, the Fifth Circuit enforced the Board's Order on April 13, 1981, without opinion pursuant to Local Rule 21 of the Fifth Circuit's Local Rules.

B. Petitioner's Position Before The United States Court Of Appeals For The Fifth Circuit

Petitioner's argument to the Fifth Circuit centered around its position that it should not be ordered to bargain with the Union, because the Board's Order was based on an inappropriate collective bargaining unit. Petitioner argued that the Regional Director of the Board had erred in his Decision and Direction of Election wherein he held that a unit composed of truck drivers was "presumptively appropriate" and that Petitioner had failed to rebut the presumption. The Decision

and Direction of Election is contained in the Appendix. Petitioner's position was that the Regional Director misapplied existing precedent and unit standards of the Board when he held that there was a presumption that truck driver units are appropriate. Petitioner further argued that the use of this erroneous unit standard had tainted the entire unit determination in the Decision and Direction of Election; that the unit determination was not supported by the substantial weight of the evidence; and that the Regional Director had allowed the extent of the Union's organization to control the unit determination in contravention of §9(c)(5) of the National Labor Relations Act, 29 U.S.C. 159(c)(5).

REASONS FOR GRANTING CERTIORARI

The Decision Below Raises Substantial and Recurring Questions Concerning Judicial Review of Governmental Action.

The questions presented deal with the role of a review court when faced with agency action in an area largely committed to the agency's discretion, when such action is the product of a misapplication of existing agency precedent and standards. This Court should consider whether summary affirmance of erroneous agency action is consistent with the principles of meaningful judicial review enunciated in *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80 (1943). Once again, this Court should address the delicate balance between reviewing courts and administrative agencies in order that the integrity of the administrative process not be undermined by judicial expediency.

The Board determined that a truck driver bargaining unit was appropriate in this case. Such unit determinations are largely the product of agency discretion. *South*

Prairie Construction Co. v. *Engineers*, 425 U.S. 800 (1976). But, as this Court has cautioned with respect to such determinations: "[W]hen the Board so exercises the discretion given to it by Congress, it must 'disclose the basis of its order' and give clear indication that 'it has exercised the discretion with which Congress empowered it' ". *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438 at 443 (1965). The Board's unit determination in this matter ran afoul of this standard. In the course of its unit determination, the Regional Director for the Board allowed that it: "had long held that a unit of truck drivers is presumptively appropriate." In fact, the Board had never utilized such a presumption. Since 1962, placement of truck drivers has been determined on a case by case basis with reference to traditional community of interest standards. *E. H. Koester Bakery Co., Inc.*, 136 NLRB No. 100 (1962); *Kalamazoo Paper Box Corp.*, 136 NLRB No. 10 (1962); and *Tallahassee Coca-Cola Bottling Co.*, 168 NLRB No. 150 (1968) affirmed 409 F2d 201 (5th Cir. 1969) — in which the Board eschewed a mechanistic approach to truck driver unit placement.

In this case either the Board applied a non-existent presumption or it fashioned a new truck driver unit standard without articulating why it departed from prior precedent. Either course smacks of abuse of agency discretion. Despite these obvious shortcomings, the Fifth Circuit Court of Appeals summarily affirmed without opinion pursuant to Local Rule 21 of the Fifth Circuit. The mode of review utilized by the Fifth Circuit was not responsive to the teachings of *Chenery, supra,* and its progeny that agency action must be judged on the grounds articulated by the agency, *F.P.C.* v. *Texaco*, 417 U.S. 380 (1974) and that departures from previous agency standards must be adequately explained,

Atchison, Topeka & Santa Fe Railway Co. v. *Wichita Board of Trade*, 412 U.S. 800 (1973). By its method of disposing of this case, the Court created the distinct impression that it had abdicated its review responsibility, perhaps because the Court felt that an acceptable result had been reached despite the use of the wrong standard. But, such an approach (substitution of judgment for the agency) is prohibited by *Metropolitan Life Insurance Co., supra.* Moreover, a Board order containing error of law should have foreclosed resort to the summary procedures of Local Rule 21 under the Circuit's own precedent. *In the Matter of Perimeter Park Investment Associates,* 616 F2d. 150 (5th Cir. 1980). Unfortunately, the Court's summary affirmance provides no insight as to the Court's rationale. Indeed, this Court has previously noted the questionable applicability of the Local Rule 21 approach in certain cases. *Taylor* v. *McKeithen,* 407 U.S. 191 (1972). This observation is especially true in this case where judicial silence can be construed as endorsement of abuse of discretion by a government agency.

The Fifth Circuit's silent affirmance of the Board's Order in this case results in a strong inference that an agency is free to exercise its authority in a capricious fashion merely because it is operating in an area of supposed expertise. Accordingly, certiorari should be granted to re-establish the parameters of meaningful judicial review of agency action.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

J. DAVID RICHESON
RICHESON & BROWN
Post Office Box 14577
North Palm Beach,
Florida 33408
(305) 842-4220

Counsel of Record for Petitioner

JAMES G. BROWN
RICHESON & BROWN
Post Office Box 14577
North Palm Beach,
Florida 33408

Counsel for Petitioner

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

No. 80-7536

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

ECKERD DRUGS OF GEORGIA, INC., *Respondent.*

Application For Enforcement Of An Order Of The National Labor Relations Board

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(April 13, 1981)

Before TJOFLAT, FAY and VANCE, *Circuit Judges.*

PER CURIAM:

ENFORCED. See Local Rule 21.[1]

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[1] See *NLRB* v. *Amalgamated Clothing Workers of America,* 430 F.2d 966 (5th Cir. 1970).

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 10 — CA — 15069

ECKERD DRUGS OF GEORGIA, INC.
and
TRUCK DRIVERS AND HELPERS LOCAL UNION NO. 728

DECISION AND ORDER

Upon a charge filed on October 1, 1979, by Truck Drivers and Helpers Local Union No. 728, herein called the Union, and duly served on Eckerd Drugs of Georgia, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 10, issued a complaint and notice of hearing on October 15, 1979, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on August 17, 1979, following a Board election in Case 10 — RC — 11797 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and

[1] Official notice is taken of the record in the representation proceeding, Case 10—RC—11797, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *In-*

that, commencing on or about September 6, 1979, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On October 25, 1979, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On November 14, 1979, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on November 23, 1979, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

RULING ON THE MOTION FOR SUMMARY JUDGMENT

In support of the Motion for Summary Judgment, the General Counsel asserts that Respondent has admitted its refusal to recognize and bargain with the Union which has been certified by the Board, and has only raised issues which it raised or could have raised in the representation proceeding.

In opposition to the Motion for Summary Judgment, Respondent contends that the unit of over-the-road drivers found appropriate in the representation proceeding is not appropriate within the meaning of the Act. Respondent requests the Board to review the unit determination, and argues that the Board's rule against relitigation of representation issues in an unfair labor practice case is not inflexible.

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tertype Co. v. *Penello*, 269 F.Supp. 573 (D.C.Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

A review of the record herein, including the record of the representation proceeding, shows that, following a hearing, the Regional Director made the unit determination that Respondent contends is inappropriate and considered Respondent's unit position. Thereafter, Respondent requested Board review of the Regional Director's decision. Upon consideration, the Board decided that the request raised no substantial issues warranting review and denied the request on August 6, 1979.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, and we do not see any special circumstances in the case which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. The Business Of Respondent

Respondent is a Georgia corporation with an office and place of business located at College Park, Georgia, where it is engaged in the distribution of drugs, cosmetics, and sundries for its approximately 150 retail drug store facilities in

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[2] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

Georgia, Alabama, Tennessee, and nothern Florida. During the past calendar year, which is a representative period, Respondent received gross revenues in excess of $500,000. During the same period Respondent received goods valued in excess of $50,000 directly from suppliers located outside the State of Georgia.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

The Union, Truck Drivers and Helpers Local Union No. 728, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The Unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All over-the-road drivers, employed by the Respondent at its College Park, Georgia, facility, but excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. The Certification

On August 9, 1979, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 10, designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on August 17, 1979, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain And Respondent's Refusal

Commencing on or about August 30, 1979, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about September 6, 1979, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since September 6, 1979, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect Of The Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining

agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions Of Law

1. Eckerd Drugs of Georgia, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Truck Drivers and Helpers Local Union No. 728 is a labor organization within the meaning of Section 2(5) of the Act.

3. All over-the-road drivers, employed by Respondent at its College Park, Georgia, facility, but excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since August 17, 1979, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about September 6, 1979, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Eckerd Drugs of Georgia, Inc., College Park, Georgia, its officers agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Truck Drivers and Helpers Local Union No. 728 as the exclusive bargaining representative of its employees in the following appropriate unit:

> All over-the-road drivers, employed by the Respondent at its College Park, Georgia, facility, but excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment,

and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facility at College Park, Georgia, copies of the attached notice marked "Appendix."[1] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. March 5, 1980

/s/ JOHN H. FANNING
John H. Fanning
Chairman

/s/ HOWARD JENKINS, JR.
Howard Jenkins, Jr.,
Member

/s/ JOHN C. TRUESDALE
John C. Truesdale
Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

[1] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL RELATIONS BOARD."

APPENDIX

Notice To Employees

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Truck Drivers and Helpers Local Union No. 728 as the exclusive bargaining representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All over-the-road drivers, employed by the Respondent at its College Park, Georgia, facility, but excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

ECKERD DRUGS OF GEORGIA, INC.
(Employer)

Dated _____ by _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Marietta Tower, Suite 2400, 101 Marietta Street N.W., Atlanta, Georgia 30303, Telephone 404--221--2886.

CASE 10-RC-11797

ECKERD DRUGS OF GEORGIA, INC.,[1] *Employer*
and
TRUCK DRIVERS AND HELPERS LOCAL[2]
UNION NUMBER 728, *Petitioner*

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Secton 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record[3] in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[4]

[1] The name of the Employer appears as amended at the hearing.

[2] The name of the Petitioner appears as amended at the hearing.

[3] The brief filed by the Employer was duly considered. The Petitioner did not file a brief. The Employer's motion to correct transcript is hereby granted, inasmuch as the Petitioner has made no objection to said motion.

[4] The Employer, a Georgia corporation with a distribution facility in College Park, Georgia, is engaged in the distribution of drugs, cosmetics and sundries for its approximately 150 retail drug store facilities in Georgia, Alabama, Tennessee, and northern Florida. There is no evidence of a prior collective bargaining history involv-

3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[5]

All over-the-road drivers, employed by the Employer at its College Park, Georgia facility, but excluding all other

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ing the Employer's College Park, Georgia facility. The Petitioner seeks a unit composed solely of all over-the-road drivers employed by the Employer at its College Park, Georgia facility. The Employer seeks to include in the unit all regular and part-time employees assigned to its College Park, Georgia distribution center. No labor organization seeks to represent all of the employees at this facility in a single unit.

[5] The employee classifications at the Employer's College Park, Georgia distribution center are: truck drivers, including tractor-trailer (A) and van (B) drivers; forklift drivers; group leaders; material handlers; maintenance employees; and clerical employees. Guy T. Elliott, the Distribution Center Manager, is in charge of the entire facility. Shipping and Transportation Manager, Bill Mann has general responsibility for all drivers, material handlers, and plant clericals. While there are various lower level supervisors over such areas as material handlers in shipping, returns, and receiving, Mann is the direct supervisor of the "A" truck drivers; whereas the "B" drivers are directly supervised by Supervisor Fred Lang, who in turn reports to Mann.

There are approximately 33 drivers in these two categories, 22 of whom are "A" drivers. All of the drivers punch a time clock located in a trailer adjacent to the College Park distribution center. Warehouse employees utilize a different time clock located inside the warehouse. Both types of truck drivers deliver regular and supplemental shipments to retail outlets, locally and out of town, although only "B" drivers carry intra-company mail and have a

employees[6], office clerical employees, professional employees, guards and supervisors[7], as defined in the Act.

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regular schedule of stores to service. All drivers transfer goods between retail stores; however, the "A" drivers also pick up goods from vendors. The "B" drivers assist material handlers with the loading of their vans on a daily basis, whereas the "A" drivers normally do not do so. When a truck reaches its destination, it is unloaded by the driver with the assistance of employees at the retail store. On burdensome tractor-trailer loads, another truckdriver or, more rarely, a material handler may be assigned to accompany the driver to help unload. The record indicates that a maintenance man, normally assigned to work on the vans and to make unspecified repairs in the distribution center itself, may be sent on occasional trips in the van, such as when a rush order is required. However, this function appears to be incidental to his primary duties. Other non-driver distribution center employees do not perform any driving functions of either the "A" or "B" drivers. While drivers in the "A" classification are required to work two days each month in the warehouse as material handlers, the record does not reflect the existence of such requirement for "B" drivers. In addition to the required warehouse work, drivers are allowed to work additional hours in the warehouse if there are not sufficient driving assignments to achieve 40 hours per week. According to summaries based upon the Employer's records for a 4-month period, "A" drivers worked approximately 18 percent of their total hours in the warehouse. These drivers are away from the distribution center at all other times except for the time they spend in preparing to leave on a delivery and checking in after a trip.

The record indicates that non-driver employees can bid on driver jobs, and that there have been transfers between warehouse and driver classifications. In the past 8 months, 10 non-driver employees were permanently re-classified as truck drivers, and 5 drivers were permanently transferred to non-driver employee categories. All of the employees at the College Park distribution center are subject to the same benefits and personnel procedures, as are all of the Employer's employees nationwide. The pay scale for the drivers is significantly higher than that of most of the other employees that the Employer seeks to include in the unit. There is

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of elec-

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no evidence that truck driver functions are performed by warehouse employees other than on an incidental basis. The minimal interaction between the drivers and the other employees is insufficient to negate the appropriateness of a unit composed solely of truck drivers. The Board has long held that a unit of truck drivers is presumptively appropriate. The fact that truck drivers and other employees share some common supervision, and also the same benefits, is not so significant so as to require a finding that the unit petitioned for is inappropriate. I further find that the truck drivers herein constitute a homogeneous and identifiable group, and inasmuch as there is no history of collective bargaining and no union seeks to include the drivers in a broader unit, a unit of truck drivers only is appropriate. *J.L. Brandeis & Sons, Inc.*, 142 NLRB 825 (1963); *Mc-Mor-Han Trucking Co., Inc.*, 166 NLRB 700 (1967); *Flav-O-Rich, Inc.*, 234 NLRB No. 150 (1977). The cases relied upon by the Employer in its brief are inapposite. Although the record reflects that the Employer's employees can transfer to and from truck driver jobs, as in *Atchinson Lumber and Logging Co.*, 215 NLRB 572 (1974), I find that the Employer's operations as a whole are not as interdependent as the logging operation in *Atchison*, nor do the employees at the Employer's distribution center interchange functions to the extent as those in the case cited. Similarly, the record does not reflect the same degree of functional integration present in *Standard Oil Company*, 147 NLRB 1226 (1964).

In view of the above finding, the appropriateness of the unit sought by the Employer is immaterial, since Board policy would not compel the Petitioner to seek the most comprehensive grouping of employees if a smaller unit is appropriate. *Ballentine Packing Company, Inc.*, 132 NLRB 923, 925 (1961).

[6] The Employer contends that the clerical located in the trailer used by the truck drivers is a plant clerical and should be included in the unit. The Petitioner took no position on this individual. In view of my finding that a unit of truck drivers is appropriate, this clerical employee is excluded from the unit. The Employer, contrary to the Petitioner, asserts that maintenance employees should be in

tion to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately

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the unit. The only evidence in the record regarding maintenance employees is that there is a maintenance man who works on the vans driven by "B" drivers, and makes unspecified repairs in the distribution center itself. This employee also makes occasional "rush" deliveries in the van. There is no evidence of any similar job requirements for maintenance men and truck drivers, of any progression between the two classifications, nor of any significant daily interchange between the employee groups. Thus, the drivers' primary duties which require that they spend a majority of their worktime away from the distribution center are significantly different than those of the maintenance employee. The maintenance man spends his worktime at the distribution center where he also does repair work not involving vehicles operated by the truck drivers. In view of the above, as well as the fact that the only interchange between the two classifications is incidental, I find on the record that there is not a sufficient community of interest between the maintenance employee and the drivers to warrant his inclusion. *Gerald G. Gogin d/b/a Gogin Trucking* 229 NLRB 529 (1977); *McMor-Han Trucking Co., Inc., supra. Flav-O-Rich, Inc.*, supra.

[7] The parties stipulated that Bill Mann, Shipping and Transportation Manager, and Fred Lang, Supervisor of class "B" drivers, are supervisors as defined in the Act. There being nothing contrary in the record, I find the above-named individuals to be supervisors and exclude them from the unit.

The Petitioner, contrary to the Employer, would exclude the dispatcher, Regina Cooper, as a supervisor. Cooper, who works in the trailer discussed above, is classified and paid as an "A" truck driver, although she cannot drive a truck. During an interim period in May, 1979, prior to the appointment of Bill Mann as Shipping and Transportation Manager, she was assigned some additional duties; however, the extent of her extra assignments is not revealed in the record.

Dispatchers who perform routine duties, and work in the same facility, with the same supervisor, and under the same classification as truck drivers, are normally included in a truck driver unit if they do not exercise any supervision or managerial authority. *Cotton*

before the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Truck Drivers and Helpers Local Union Number 728.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *N.L.R.B.* v. *Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that

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Producers Association d/b/a/ CPA Trucking Agency, Boaz, 185 NLRB 452 (1970). *Vangas, Inc.*, 167 NRLB 805 (1967). However, a dispatcher who responsibly directs work or makes the basic decisions regarding shipping priorities and assignments would properly be excluded from a unit of truckdrivers. *Norfolk, Baltimore & Carolina Lines, Inc.*, 175 NLRB 209 (1969); *Groendyke Transport, Inc.*, 171 NLRB 997 (1968). Since the record does not indicate whether Cooper engaged in any independent decision-making in the course of performing her duties, I am directing that she vote a challenged ballot.

within 7 days of the date of this Decision, 2 copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Atlanta Regional Office, 101 Marietta Tower, Suite 2400, 101 Marietta Street, N. W., Atlanta, Georgia 30303 on or before July 20, 1979. No extension of time to file this list may be granted nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply witn this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570. This request must be received by the board in Washington by July 26, 1979.

Dated July 13, 1979

at Atlanta, Georgia

CURTIS L. MACK
Regional Director,
REGION 10

Section 10(e) Of The National Labor Relations Act, As Amended, 29 U.S.C. §160(e)

(e) The Board shall have the power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the

record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.